The War Powers of Congress, and of the President.

24

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DELIVERED BEFORE

THE NATIONAL CLUB OF SALEM,

MARCH 13, 1863.

By JOEL PARKER.

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Mem. — It may well be supposed, from its length, that some portions of this Address were omitted in the delivery. Additions have been made, in order more fully to develop the argument.

ADDRESS.

Gentlemen of the National Club:

We are prone to believe what we wish to be true. "Thy wish was father to that thought," expresses a great truth as fully to-day as it has ever done heretofore. Especially is this tendency of the mind active and conspicuous in times of excitement, when of course the exercise of the reasoning faculties is the more difficult, and the temptation to adopt the results of feeling and inclination is all the more powerful. In such periods, it requires much less of effort on the part of designing, interested, unscrupulous politicians, to impose their fallacies and their sophisms, their false premises and their mischievous conclusions, upon an excited, and therefore, to some extent, greater or less, an unreasoning community.

In such periods, great and sudden changes of opinion on the part of the leaders of a party are followed by corresponding changes, not only among those who hang upon their skirts for the purpose of procuring preferment, favor, profitable contracts, — for the purpose of passing off shoddy as a merchantable fabric, — for the purpose of covering up defalcations as public agents, — for the purpose of escaping punishment for abuses of power, — but also on the part of that portion of the rank and file of the party who are ever ready to believe that the party is right, because they desire its success.

In nothing has this tendency of the mind, and this course of action, been made more manifest, recently, than in measures adopted by the administration of the General Government, and in the support of those measures, which are founded upon interpretations of the Constitution at variance with its plainest principles; and in assumptions of power which convert republican institutions, framed for the purpose

of guarding and securing the liberties of the citizen, into a military despotism, in which the people have no rights, but such as the throne, or the power behind the throne, pleases to accord to them.

There is many a supporter of the powers claimed in behalf of the present administration, who, if he had been told five years since, that within that period he would have sacrificed the principles of liberty, upon the altar of any party, or policy, — by the maintenance of his present opinions respecting the powers of the President in times of war, — would indignantly have exclaimed, in the language of Hazael to the prophet Elisha, "is thy servant a dog, that he should do this great thing."

This change from the principles of a free republic, to those of a military despotism, would be "passing strange," and "piteous wonderful," did we not consider the facility with which men persuade themselves of the truth and soundness of that which is in accordance with their own wishes.

It is not to be assumed and it might be uncharitable, perhaps, to believe that all those who a few years since constructed elaborate arguments to prove that the clause in the Constitution of the United States, respecting the return of fugitives from service, or labor, did not apply to fugitive slaves, because the term slave was not found in the paragraph, were mere fraudulent pretenders, who not only knew their arguments to be altogether unsound, but wilfully misrepresented the import of the provision, for the wicked purpose of misleading others, in order to accomplish sinister purposes; — notwithstanding a uniform construction by the framers of the Constitution, by Congress, and by the Judiciary, for more than half a century, could have left no doubt in the mind of any honest, sane man, whose powers of reasoning had not been perverted by his wishes, or something worse, that the true construction was as little liable to dispute, as his own existence, — and that such construction did embrace fugitive slaves, and was designed to apply to no other class of persons.

We certainly cannot suppose that all the members of the community, who have attempted to sustain the constitutionality of the personal liberty laws of some of the Northern

States, were actuated by sinister motives, for there are names in that catalogue above the suspicion of an attempt at deception; but we may well conclude that their desire to believe that those laws were within the pale of the Constitution, had to some extent affected their powers of reasoning; because on other subjects, where there was nothing to bias the judgment, they were in the habit of arriving at sound conclusions.

A reasonable charity may lead us to think that the person, who, upon the election of Mr. Lincoln, boasted that we had "got our heel upon the neck of the slave power," and intended to keep it there, had some faith in the actual existence of that supposed subjugation; and did not at that time anticipate the war which may have been promoted, to some extent, by that unfortunate declaration.

And it is not a great stretch of credulity to conclude, that another individual, who, in the Senate, undertook to prove, by nine resolutions, that the acts of secession had converted the seceding States into Territories of the United States; and who thereby ignored all the history of the formation of the States, and of the subsequent construction of the Union, and perverted the principles of law applicable to that history, was to some extent influenced by the wish, that by means of such a territorial subjugation, he might advance his favorite project of magnifying the Senator, through the emancipation of the slaves.

On the other hand it would undoubtedly be rather too hard a strain upon the credulity of the community, to ask their undoubting confidence that all persons who, in Congress and out of Congress, have attempted to sustain an alleged constitutional right of slaveholders to take their slaves into any of the Territories of the United States, and to hold them there in slavery, irrespective of the legislation of Congress, prohibiting slavery there, were misled by their wishes into a belief that such doctrine was sound Constitutional Law.

And it must require a full exercise of that Christian charity which "believeth all things," to convince us of the entire faith, on the part of those who adduce them, in the soundness and validity of all their arguments, in favor of

that construction of the Constitution which changes its whole character in time of war, from that which it had in time of peace, and renders all its provisions in favor of private rights, not merely a dead letter, but a mockery and a deception.

The first half of the present century was marked by astounding events and wonderful inventions. The rise of an imperial despotism upon the ruins of the French Republic, at the close of the last century, is significant in its warning to us at the present time. God grant that we may not follow republican France through the extremes of a popular frenzy, wading in blood on the one hand; and the iron rule of a military despotism on the other; with all the intermediate experiments of government which have marked her history during the last fifty years.

But it was reserved to the last half of the nineteenth century, to present to the world events more surprising in their character, and an invention which ought to be more astonishing in its inception, than all those of the half century which preceded it. Events which have turned the exultation of a magnificent prosperity, such as the world never saw, into the sadness and gloom of civil war; — and an invention which may yet prove far more disastrous to the freedom of the people, and to the hopes of constitutional liberty throughout the world, than the inventions of the previous fifty years have proved beneficial to its physical and material prosperity. The *events* are the rebellion of the people of the Southern States, with the immediate causes and concomitants of that rebellion. The *invention* is that of "the war powers of Congress and of the President," under a new construction of the Constitution.

The rebellion stands without a parallel, and without reasonable excuse, an outrage upon civilization, a vast crime against humanity, an insurrection against free principles, and treason against liberty, shaking to its foundations the confidence of mankind in the capacity of the people to govern themselves.

There were doubtless conflicting interests, to some extent, between Northern and Southern productions, and of course conflicting views respecting free trade and protective duties.

These conflicting interests did not originate in slavery, though that may have rendered them more antagonistic. They would still have existed, if the labor of the South, like that of the North, had been the labor of freemen. The conflict is rather one of *production*, than of the *means of production;* one of *interests*, rather than of *institutions*. There were no material causes for the discontent on this score, which did not exist on the formation of the Union, except that the introduction of the culture of cotton, and the extent of its use have aggravated the antagonism of interests, to a much greater degree. The difference of latitude indicated, from the outset, difference of production, and variance of interests; against which were great national advantages, far outweighing and counterbalancing local considerations. And the reason for complaint, — that local interests were attempted to be sustained without regard to the greatest good of the whole, — was certainly not all upon one side. That there were also sources of discontent from a somewhat different organization of society, and diverse systems of labor resulting therefrom, is undoubtedly true, but these systems of free and slave labor, which had existed for half a century, without collision, under the Constitution, might have existed half a century more, without any "irrepressible conflict" resulting in an appeal to armed force, had not the unholy passions and the *irrepressible ambition* of individuals urged them into a collision, in order to gratify a greed of gain, a lust for power, and a thirst for revenge. Here again it must be admitted that the greed, the lust, and the thirst, have not been all on one side. And although the professions of philanthropy may have been somewhat unequally distributed, the annoyance arising therefrom may have been counterbalanced by violence and threats in the districts where that article was deficient.

Constitutional obligations have availed little to restrain the extravagance of ultraists on either side; the attempts forcibly to resist the execution of the fugitive slave law, on the one hand, and the determination to force slavery into the Territories despite the constitutional power of Congress to govern these Territories in the wisdom of its discretion, on the other, being the types of antagonism of the different sections.

Secession was the work of conspirators in the interest of politicians at the South. The discovery or invention of what are now called "the war powers of Congress and of the President," has grown out of the rebellion, for the purpose of accomplishing the designs of conspirators at the North. It may properly be termed an *invention*, because in two wars in which the Republic has been engaged, at different periods, one to assert rights violated and outraged by Great Britain, and one in reality with a design of conquest, waged under the plea of wrongs, which if true required no such resort to arms, nothing was heard of such war powers as are now said to exist in Congress and in the President as commander-in-chief. And nothing would have been heard of them now, had it not been that certain politicians of an ultra school, had an object to accomplish, which could not be effected by any of the powers heretofore supposed to exist under the Constitution, (an object which is in its nature as revolutionary as the rebellion itself, though not so atrocious,) and being unwilling, with here and there an exception, to avow their object as *revolution*, they have sought to disguise it under the pretence of constitutional authority.

A claim is set up, through the means of these war powers, to change the institutions of the States at the pleasure of Congress, or of the President, — a claim that the President may institute martial law over States within which no hostile foot has trod, or is likely to tread, — over persons within those States, whose only notice that they are to be subjected to the government of force, is the arrest which confines them in the dungeon, — and a claim that the President may suspend the Writ of Habeas Corpus, throughout the United States, so that that imprisonment will continue at the pleasure of somebody who orders the arrest, unless the President in his mercy or justice rescinds the order.

If these claims are valid, every person at the South, whether loyal or disloyal, holds the title to his property at the pleasure of the President; and every person at the North retains his liberty, only until a presidential fiat, or the warrant of some judge advocate, issued, perhaps, upon a vague and unfounded suspicion, deprives him of it.

Claiming to be powers derived from and under the Con-

stitution, these war powers subvert all constitutional principle. Pretending to be the instruments of republicanism, they turn the Government into a military despotism. Assuming to be an agency of a free government, their exercise at once puts an end to all constitutional liberty. Professing to be brought into action for the purpose of emancipating three millions of slaves, they consign to political slavery *twenty millions of freemen.*

I cannot acquiese in the alleged duty to give a universal and blind support to all the measures, adopted by men in office, even in time of war, when I have a most absolute and perfect conviction that those measures are not warranted by the Constitution, and that the alleged powers under which they are adopted, are utterly subversive of constitutional liberty. I assert a right of judgment and condemnation, through and by means of legal constitutional argument; with no fears of that kind of rabid denunciation which attempts to stigmatize all persons who do not swear by the dogmas of party leaders as disloyal, and the friends of slavery. My opinions in relation to slavery are, I trust, too fully known to admit of an accusation of any favor to it, of any description; and my sentiments respecting the atrocity of the rebellion, and the necessity of suppressing it, have been so uniformly and fully expressed, that there is no room for any material misapprehension.

If the vanity of a supposition that I am known at all in this community, may be supposed to exist, it must be because of an unwavering support of constitutional rights, and of the principles of free government; — and I hope to be equally well known, however limited the extent, for an uncompromising opposition to all attempts to legalize arbitrary power, except so far as war introduces martial law in the districts and places which are the theatre of active warlike operations. Even there the power is not, strictly speaking, arbitrary. It ought to be exercised with a sound discretion, for the purposes of justice.

I propose to show that there is no sound foundation on which to rest any such extreme "War Powers" as are claimed for Congress, and for the President.

There is nothing in the language of the Constitution

which sustains the assumption of any such power. There is nothing in the situation of the country which renders the exercise of any such power necessary or proper as an incident to the powers granted in the Constitution. There is nothing in the history of Great Britain, since the revolution there in 1688, which justifies the supposition that such power can be derived from the common law, even if that law were resorted to as a means by which to interpret the language of the Constitution. There is nothing in the colonial or revolutionary history, or in the history of the adoption of the State constitutions, or in the adoption of the Constitution of the United States, which can for a moment sustain the assumption of any such war powers, either by Congress or by the President. And there is nothing material to the suppression of the rebellion, which may not be accomplished without the assumption of such a construction of the Constitution.

I am not aware who is entitled to be regarded as the original discoverer or inventor of these war powers; but improvements and specifications have been set forth in an elaborate pamphlet, by a gentleman of the Bar in Massachusetts, somewhat celebrated for his advocacy of patent cases, who has "gone to his reward" in a solicitorship in the War Office, created at first, without law, and afterwards by law, and, thus filled, it is understood in consequence of his improvements in this branch of constitutional law. As the powers are claimed as constitutional powers, the arguments which attempt to maintain them, may perhaps, under such circumstances, not inaptly be designated as *Patent-War-Office*-Constitutional law.*

I propose to examine some of the principal positions upon this subject, attempted to be maintained in this pamphlet. The course of argument in the introductory part of it, designed to prepare the way for the succeeding matter, on the suggestion that slavery is the cause of the war, and must itself be terminated, may as well serve to prove almost anything else. The principal points of this introduction may

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* "*The War Powers of the President, and the Legislative Powers of Congress, in Relation to Rebellion, Treason, and Slavery.*" By William Whiting.

be summed up in this wise. The Constitution was established to form a more perfect Union. A handful of slave-masters have broken up that Union, and attempted to establish an aristocratic government founded upon slavery. It is the conviction of many thoughtful persons that slavery has become practically irreconcilable with republican institutions, — that it constitutes the chief obstacle to the restoration of the Union. Slaveholding communities constitute the only privileged class. The spinning-jenny and the cotton-gin have created an unlimited demand for cotton, and slavery has increased. In other countries it has been abolished. However harmless it may have been in 1788, it is believed by many that slave-masters of the present day will not conduct themselves peaceably in the Union. And the conspiracies of traitors, — their abhorrence of republican institutions, — their causeless rebellion, — their bitter hatred of the people of the Free States, — have produced a general conviction that slavery, which has alone caused these revolts, must itself be terminated, and the privileged class be abolished, otherwise the Government must be overthrown, and constitutional liberty be abandoned.

With a very slight variation, it may be proved with equal cogency, that *cotton* is the cause of the rebellion, and that cotton-growing must be abolished. As for instance: The Constitution was established to form a more perfect Union. A handful of *cotton-growers* have broken up that Union, and attempted to establish an aristocratic government founded upon *the notion that "cotton is king."* It is the conviction of many thoughtful persons that *the cultivation of cotton* has become practically irreconcilable with republican institutions, — that it constitutes the chief obstacle to the restoration of the Union, *having been the means of enticing Englishmen to violate the blockade, and to supply the Confederates with munitions of war, and other merchandise. Cotton growing* communities constitute the only privileged class. The spinning-jenny and the cotton-gin have created an unlimited demand for cotton, and its cultivation has increased. In *many* other countries *it is not grown.* However harmless it may have been in 1788, *and in* 1792 *when a protective duty was laid to encourage its cultivation*, it is believed by many that *cotton-growers* of the present day will not conduct

themselves peaceably in the Union. And the conspiracies of traitors, — their abhorrence of republican institutions, — their causeless rebellion, — their bitter hatred of the people of the Free States, — have produced a general conviction that *cotton-growing*, which alone has caused these revolts, *as without cotton there would have been no rebellion*, must itself be terminated, and the privileged class abolished; otherwise the Government must be overthrown, and constitutional liberty abandoned.

You perceive that with the substitution of *cotton-growing* for *slavery*, and the addition of very few words, much the stronger case is made against cotton, as the origin and support of the rebellion. And if, with a little more of alteration, you please to substitute instead of either, the *inordinate ambition of unscrupulous politicians*, as the cause of the insurrection, you may make out another and a still stronger case. If we could effectually "strike at" that "root" of evil, we might terminate the war in a very short time.*

The introductory chapter of the pamphlet proceeds with these questions: —

"Is the Union so organized that the means of involving the whole country in ruin must be left in the hands of a small privileged class, to be used at their discretion? Must the blessing of peace and good government be dependent upon the sovereign will and pleasure of a handful of treasonable and unprincipled slave-masters? Has the Constitution bound together the peacable citizen with the insane assassin, so that his murderous knife cannot lawfully be wrenched from his grasp, even in self-defence?"

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* It is of some importance to note the fallacy of this notion that slavery is the cause of the rebellion, because much of the argument, in favor of the power to proclaim a general emancipation, has been made to depend upon that as its basis. Slavery has been the pretext, rather than the cause, of the war. The attempt to maintain a constitutional right to introduce it into the Territories, was more for the purpose of securing political power, than for any purpose, having a natural connection with slavery itself. Remotely, slavery may have had an agency in producing the rebellion, by fostering the ambition, which was the immediate cause of it. But that kind of ambition may be found where there is no slavery of the negro. Had not General Jackson occupied the Presidential chair in 1833, we might have had a rebellion, on the alleged inequality of the tariff. Should we in that case have declared that the tariff was the cause of the rebellion, and that "we must strike at that, as the root of it"?

"If the destruction of slavery be necessary to save the country from defeat, disgrace, and ruin, — and if, at the same time, the Constitution guaranties the perpetuity of slavery, whether the country is saved or lost, — it is time that the friends of the Government should awake, and realize their awful destiny."

This mode of putting the argument, as if there was, on the part of somebody, favor towards slave-holders, and a denial to the Government of power to save itself, — as if some party was contending that the Constitution guarantied the perpetuity of slavery, whether the country was saved or lost, — as if the success of the war was dependent upon its being waged by proclamations against slavery, instead of being carried on energetically by shot and shell against the instigators and abettors of the rebellion, — ought not to deceive any one respecting the true issue involved in the denial of unlimited power on the part of Congress and the President; but it is significant of what we are to expect in the mode and manner of the subsequent discussion.

It is the favorite mode of argument of those who seek to exercise despotic power for the purpose of effecting their great project of emancipation, irrespective of constitutional right, and regardless of the final salvation of the Union; and who would rather have the rebellion succeed, and the country dismembered, than to have the rebellion crushed unless slavery is crushed with it.

With these questions as the basis, put in this spirit, we ought not perhaps to be surprised to find an assertion following, that, —

"*They*," [the people] "mean to uphold a *Union, under the Constitution, interpreted by common sense;* a *government* able to attain results worthy of a great and free people, and for which it was founded; a *republic*, representing the sovereign majesty of the whole nation, clothed with ample powers to maintain its supremacy forever."

Which is all well enough with a proper application. Nor should we be astonished to find a little farther on the suggestion that the Constitution is, —

"Only a *frame* of government, a *plan-in-outline* for regulating the affairs of an enterprising and progressive nation;" — then the assertion that, —

"Our Constitution, like that of England, contains all that is required to adapt itself to the present and future changes and wants of a free and advancing people;" — and furthermore that, —

"Leaving behind us the body of laws regulating the rights, liabilities, and duties of citizens, in time of public tranquillity, we must now turn our attention to the RESERVED and HITHERTO UNUSED powers contained in the Constitution, which enable Congress to pass a body of laws to regulate the rights, liabilities, and duties of citizens in time of war."

These are some of the fundamental positions on which the war powers of Congress and the President are based. A momentary consideration must assure any one, that if the Constitution has this elastic India-rubber character, the provisions for its amendment are entirely useless, because the party in power can, by construction, either before or after amendment, make it adapt itself so that it will answer any purpose which in their opinion will subserve the "present and future changes and wants of a free and advancing people"; and "reserved and hitherto unused powers" may be discovered, from time to time, to authorize any measure which the President, for the time being, may think it expedient to adopt. It will thus go at least one step beyond the British constitution, which, while it admits Parliament to be omnipotent, and asserts that the King can do no wrong, — maintains that ministers may sometimes usurp power, and holds them accountable for the usurpation.

It should not be surprising on the other hand, that those who deem the Constitution (honestly interpreted according to the intention of those who framed and adopted that instrument as the supreme law) to be the ark of our political salvation, should dissent from doctrines which render the guaranty of personal rights by the Constitution a mockery, and under the cover of constitutional security confer despotic power over property, liberty, and even life itself, — not because, as is falsely alleged, they have any sympathy with traitors, or any favor for slavery, or any desire to oppose the Government in its efforts to subdue the rebellion, — but because they see in this perversion of the Constitution to suit the purposes of a party, *first*, a more firm union among the rebels, and a more determined resistance to the restora-

tion of the rightful authority of the Union; *second*, division of opinion necessarily among those who are determined to sustain the Government and to give a hearty support to all its measures, if they may be permitted so to do; *third*, as a consequence of this unity where they hoped for division, and of this division where they desired union, the possible, not to say probable, success of the rebellion, and the security, instead of the overthrow, of slavery; *fourth*, the disintegration of the States now united, by the accession, in the first instance, of some of the States on the upper Mississippi, to the power which in case of the success of the rebellion will control its mouth, followed by the larger States in the interior, and upon the seaboard, for the sake of retaining the trade of the "Great West."

It is for reasons like these, that I proceed to expose some of the fallacies in the body of the work, which are not less palpable than those of the introduction.

The first argument adduced for the purpose of showing the right on the part of the General Government to emancipate all the slaves is deduced from its right in time of peace —

"*to appropriate to public use private property of any subject or any number of subjects owing it allegiance.*"

You perceive that the advocate of despotism naturally begins by talking of *subjects*, instead of *citizens*. He proceeds to say, —

"Every appropriation of property for the *benefit* of the United States, either for a national public improvement, or to carry into effect any valid law of Congress for the maintenance, protection, or security of national interests, is public *use*." "*Public use* is contradistinguished from *private use*. That which is for the *use of the country*, however applied or appropriated, is for public use."

"Public use does not require that the property taken shall be actually *used*. It may be *disused*, *removed* or *destroyed*. And destruction of private property may be the best public use it can be put to."

"Congress has power to pass laws providing for the common defence and general welfare under Art. I. Sect. 8, of the Constitution; and whenever, in their judgment, the common defence or general welfare requires them to authorize the appropriation of private property to public use, — whether that use be *the employment or de-*

struction of the property taken, — they have the right to pass such laws; to appropriate private property in that way; and whatever is done with it is 'public use,' and entitles the owner to just compensation therefor."

This argument is founded on what is known among lawyers as the right of *eminent domain*, in virtue of which land is taken for highways, canals, turnpikes, forts, &c. The argument based upon that principle would seem to read in this way, — The Government can take property for forts, docks, yards, lighthouses, &c., *therefore*, the Government may emancipate the slaves; which is not sound reasoning, because there is no similarity whatever in the character of the two acts.

By a similar process of reasoning, Congress may order any property of any person to be destroyed because that it is a public use of it. Perhaps they would be bound to make compensation; but by an extension of the same process of reasoning they may at the same time order the owner, and all who claim anything under him, to be hanged, on the ground that every man owes service to the country, and that to be hanged is the best service that such a claimant of compensation can render. This would effectually discharge the claim for indemnity.

An attempt to reason in this way, applying the principles of *eminent domain* to matters which have no relation to that subject, is to make an utter confusion of legal principles. If slavery is the root and cause of the rebellion; if by that "alone the country has been brought to the verge of ruin;" and if the republic can triumph only by overthrowing slavery; then slavery is an antagonistic force and power, to be subverted and destroyed in some way, — by revolution, perhaps, if necessary, — but it is not to be taken and appropriated to the public use. The principle applicable to it would be that applied to nuisances, rather than that which regulates the right of the Government in making provision for its wants.

The Government does not take an enemy for public use, under the power to supply its necessities. It does not deal with antagonistic forces, attempting its overthrow, by the appointment of commissioners to consider how much of those forces it is necessary to take, in order to supply in-

creased facilities for itself and its citizens, and to appraise the damage which will be done to the owner of the antagonism. It never takes a nuisance for public use. What the Government destroys, of that character, to relieve the public from injury, threatened or suffered, it acts upon by an antagonistic power to wit: that of police. The principle is stated by Mr. Justice McLean, 5 Howard's Supreme Court Rep. 589. "The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed." (See also 11 Metcalf's, Rep. 57; 1 Gray's Rep. 1, 27.)

But the argument in favor of the "War Powers," proceeds with more confidence on the clause of the Constitution authorizing Congress "to provide for the common defence and general welfare." It is said, —

"It will be readily perceived that the right to abrogate and cancel the obligations of apprentices and slaves does not rest solely upon the power of Congress to appropriate private property to public use; but it may be founded upon their power and obligation to accomplish one of the chief objects for which the Union was formed, viz: to provide for the *common defence* and *general welfare* of the United States."

* * * * *

"The powers conveyed in this 18th Clause of Art. I. Sect. 8, are of *vast* importance and extent.

"It may be said that they are, in one sense, unlimited and discretionary. They are more than imperial. [!!!] But it was intended by the framers of the Constitution, or, what is of more importance, by the *people* who made and adopted it, that the powers of Government in dealing with civil rights in time of peace, should be *defined* and limited; but the powers to 'provide for the *general welfare* and *common defence*' should be *unlimited*."

* * * * *

"Whenever, in the judgment of Congress the common defence and public welfare require the removal of the condition of slavery, it is within the scope of their constitutional authority to pass laws for that purpose."

* * * * *

"It has been so long the habit of those who engage in public life to disclaim any intention to interfere with slavery in the States, that they have of late become accustomed to deny the *right of Congress* to do

so. But, *the Constitution contains no clause or sentence prohibiting the exercise by Congress of the plenary power of abrogating involuntary servitude.* The only prohibition contained in that instrument, relating to persons held to labor and service, is in Art. IV. which provides that, 'No person held to labor and service,' &c. . . . . *This restriction is, in express terms, applicable only to State legislatures, and not to Congress.*"

* * * * *

"That a power is withdrawn from the States, indicates, by fair implication, that *it belongs to the United States*, unless expressly prohibited, if it is embraced within the scope of powers necessary to the safety and preservation of the Government, in peace or in civil war."

* * * * *

"It would be a singular species of reasoning to conclude that, because the Constitution prescribed certain rules of conduct towards persons *escaping from one State into another*, therefore, there is no power to make rules relating *to other persons who do not escape from one State into another.*"

* * * * *

"If Congress should discharge the obligation of slaves to render labor and service, by passing a law to that effect, such law would supersede and render void all rules, regulations, customs, or laws of either State to the contrary, for the Constitution, treaties, and laws of the United States are the supreme law of the land."

* * * * *

"If the framers of the Constitution intended to take from Congress the power of passing laws relating to slaves in the States or elsewhere, they would have drafted a clause to that effect." [!!]

These extracts show the kind of argument from which the author draws his conclusions, assuming that he has shown that the General Government may abolish slavery under the power to appropriate private property to public use, and the power to provide for the public welfare and common defence; and asserting "that this power is left to the discretion of Congress, who are the sole and exclusive judges as to the occasions when it shall be exercised, and from whose judgment there is no appeal."

This course of reasoning upon the right of Congress to provide for the public welfare and common defence, ignores the history of the formation of the States and the Union; forgets that the United States is a Government of limited

powers, and the express provision in the amendments to the Constitution that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people;" annihilates the powers of the States at the pleasure of Congress; and applies with equal force to anything else.

The Constitution contains no clause or sentence prohibiting Congress from reënacting the edict of Herod, that all the young children should be slain, under an assumption, within such discretionary power of Congress, that if they were permitted to live, they might rebel, and endanger the safety of the Government. Nor does the Constitution contain any clause or sentence, prohibiting Congress from directing that all the Catholics shall be murdered on a particular day; and what shall hinder that body, in the exercise of powers "unlimited" and "more than imperial," from proceeding to such constitutional legislation, whenever, in their judgment, the public welfare requires it. Why may we not conclude that "If the framers of the Constitution intended to take from Congress the power of passing" such laws, "they would have drafted a clause to that effect."

It might well be supposed that even a very limited knowledge of the Constitution and its history should have restrained any one from such a course of argument.

In the convention in Virginia which ratified the Constitutian of the United States, Patrick Henry, who opposed the ratification with all his powers, and raised every objection which his ingenuity could devise, said of Congress, —

"If the Constitution is adopted, they will search that paper, and see if they have power of manumission. And have they not, sir? Have they not power to provide for the general defence and welfare? May they not think that these call for the abolition of slavery? May they not pronounce all slaves free; and will they not be warranted by that power? This is no ambiguous implication or logical deduction. The paper speaks to the point; they have the power in clear, unequivocal terms, and will clearly and certainly exercise it."

But Governor Randolph, who was himself one of the most able men in the convention which framed the Constitution, replying to this remark of Mr. Henry, said, —

"We are carried back to the clause giving that dreadful power, for the general welfare. Pardon me, if I remind you of the true state of that business. I appeal to the candor of the honorable gentleman, and if he thinks it an improper appeal, I ask the gentlemen here, *whether* there be a *general*, *indefinite* power of providing for the general welfare? The power is 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare;' so that they can only raise money by these means, in order to provide for the general welfare. No man who reads it can say it is general, as the honorable gentleman represents it. You must violate every rule of construction and common sense, if you sever it from the power of raising money, and annex it to anything else, in order to make it that formidable power which it is represented to be." 3 *Elliot's Debates*, 599.

And Mr. Madison, one of the most distinguished members of the convention which adopted the Constitution, in reply to that objection, made by a member of the Virginia convention, said, —

"I was struck with surprise when I heard him express himself alarmed with respect to the emancipation of slaves. Let me ask, if they should even attempt it, if it will not be a usurpation of power? There is no power to warrant it, in that paper. If there be, I know it not." 3 *Elliot's Debates*, 621.

Mr. Justice Story, in his Commentaries on the Constitution, referring to these two readings of this clause, by one of which a general substantive power would be given to Congress to provide for the common defence and general welfare, and by the other of which, that part of the clause is confined to laying and collecting taxes, duties, &c. says: —

"The latter has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable. The reading, therefore, which will be maintained in these Commentaries, is that, which makes the latter words a qualification of the former; and this will be best illustrated by supplying the words, which are necessarily understood in this interpretation. They will then stand thus: 'The Congress shall have power to lay and collect taxes, duties, imposts, and excises *in order* to pay the debts, and to provide for the common defence and general welfare of the United States;' that is for the purpose of paying the public debts, and providing for the common defence and general welfare. . . . . If the clause, 'to pay the debts and provide for the common defence and

general welfare of the United States,' is construed to be an independent and substantive grant of power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers; but it plainly extends far beyond them, and creates a general authority in Congress to pass all laws, which they may deem for the common defence or general welfare. Under such circumstances, the Constitution would practically create an unlimited National Government. The enumerated powers would tend to embarrassment and confusion; since they would only give rise to doubts as to the true extent of the general power, or of the enumerated powers."

. . . . . "On the other hand, construing this clause in connection with, and as a part of the preceding clause, giving the power to lay taxes, it becomes sensible and operative. It becomes a qualification of that clause and limits the taxing power to objects for the common defence or general welfare. It then contains no grant of any power whatsoever; but is a mere expression of the ends and purposes to be effected by the preceding power of taxation." 2 *Story's Commentaries on the Constitution*, Sects. 905, 906, 908.

It has been reserved for a new generation of theorists to revive this long-exploded attempt of the enemies of the Constitution to give it a construction which would subvert the powers of the States.

The following extracts are from the second chapter of the pamphlet, devoted to the war powers of Congress.

"The United States are AT WAR with rebels in the strictly legal and constitutional sense of the term, and have, therefore, all the rights against them which follow from a state of *war*, in addition to those which are derived from the facts that the rebels are also subjects."

"Having thus the full powers and right of making and carrying on war against rebels, both as subjects and as belligerents, this *right* frees the President and Congress from the difficulties which might arise, if rebels could be treated *only* as SUBJECTS, and if *war* could not be waged upon them."

"But a rebel does not cease to be a subject because he has turned traitor. The Constitution expressly authorizes Congress to pass laws to punish traitor — that is, belligerent — subjects; and suppressing rebellion by armed force, is making war. Therefore the war powers of the Government give full belligerent rights against rebels in arms."

"THE LAW OF NATIONS IS ABOVE THE CONSTITUTION." . . .

"It will be observed, that the law of nations is above the constitution of any government."

"To determine what are the rights of different nations when making war upon each other, we look only to the law of nations."

Now it is true that, in the case of an extensive rebellion resulting in a civil war, the Government may, by the recognition of foreign nations, be obliged to treat the rebels as belligerents in some particulars, — as for instance, in the institution of a blockade, — because those nations would otherwise claim a right to trade in the ports occupied by the rebels; and humanity, perhaps necessity, may lead to an exchange of prisoners. This does not take away the right to punish the insurgents as rebels. The law of nations governing belligerent rights, is applied to the operations of the war to which that law is applicable; subject, however, to all the limitations and restrictions imposed by the Constitution and laws of the United States, upon those acting under the Constitution in the prosecution of the war. The Constitution and the laws of the United States are alone applicable to the war so far as the insurgents are to be treated as rebels.

This right to deal with the rebels as belligerents, and the necessity of doing so in some particulars, will not show that the Government may commission privateers, to cruise against them as rebels, (privateering being a belligerent right, never, so far as I am aware, exercised against rebels,) and still punish those who war against it as rebels, by confiscation and death, for the crime of treason.

But the astounding position that "the law of nations is above the Constitution" in regulating the action of Congress and of the President, (which is announced in capitals, and afterwards repeated,) if it were accepted, must abrogate all legislation of Congress for the punishment of rebels and traitors, after they are treated as belligerents, and thus come under the law of nations, in the prosecution of the war. If the law of nations is to be set above the Constitution, and to furnish the rule, because the rebels are belligerents, then, upon the suppression of the rebellion by the proposed conquest of the territory of the seceded States, Davis, Floyd, Thompson, and others, if seized, will become prisoners of war, and entitled to be treated as such.

The author appears to have a glimmering consciousness

that his argument leads to such a result, and enters a *caveat* against it; but he does not show how his *caveat* is to avail, if "the law of nations is above the Constitution."

Furthermore, any one who will give but a limited examination to the question, — What are the nature, character, objects, and certainty of the Law of Nations, will perhaps be ready to ask, — Who authorized the rebels, or Congress, or the President, or all of them, to place that law above the Constitution?

This argument, if admitted, will not serve to prove the existence of the power contended for, as the law of nations does not recognize the power of one belligerent, by any act of legislation, or by proclamation, during the war, to change the institutions and domestic relations of the other belligerent. What is not actually changed by the war, remains, on the conclusion of the war, as it was before. When conquest has given control, the legislative power of the conqueror may change the laws of the conquered party.

The author next gives us another very remarkable specimen of legal reasoning. Referring to certain proceedings which have been alleged to be in violation of those amendments of the Constitution which declare "that no man shall be deprived of life, liberty, or property, without due process of law; that private property shall not be taken for public use without just compensation; that unreasonable searches and seizures shall not be made; freedom of speech and of the press shall not be abridged; and that the right of the people to keep and bear arms shall not be infringed," — the general proposition is enunciated: —

"THESE PROVISIONS NOT APPLICABLE TO A STATE OF WAR." And the author proceeds to add, "If these rules are applicable to a state of war, then capture of property is illegal, and does not pass a title; no defensive war can be carried on; no rebellion can be suppressed; no invasion can be repelled; the army of the United States, when called into the field, can do no act of hostility. Not a gun can be fired *constitutionally*, because it might deprive a rebel foe of his life without *due process of law* — firing a gun not being deemed "due process of law."

Now it is to be noted, that this proposition that these provisions of the Constitution are not applicable to a state of

war, is asserted as a general proposition, and not as one applying to those parts of the country where the war is actually in progress, and where, therefore, the law of force may be, for the time being, the governing power. This kind of reasoning ignores the true meaning and application of the different clauses of the Constitution; and in this mode you may prove anything either way. For instance, — the Constitution says no man shall be deprived of life, liberty, or property without due process of law, — firing a gun is not due process of law; therefore firing a gun for the purpose of taking life, even in self-defence, is unconstitutional. Or, take it the other way: The Constitution gives the right to make war; — in making war the people are deprived of life, liberty, and property; — therefore, in making war, there is no constitutional guaranty on this subject, and you may deprive anybody of life, liberty, and property at pleasure.

But a very conclusive answer to this position is, that these amendments of the Constitution, thus unceremoniously discarded in time of war, are derived mainly from, and are substantially but repetitions of, provisions previously inserted in the Constitutions of several States; — Constitutions made in time of war, to go into effect immediately, some of their provisions being specifically applicable to a time of war; — that the provisions were introduced into those Constitutions to guard and protect the liberties of the people in time of war; that their effect and value is in time of war; that their absence from the Constitution of the United States, as originally framed, was one great objection to its adoption, and came near producing its rejection; that the belief that they would be adopted by way of amendment, doubtless saved it from that catastrophe; and that they were thus introduced from a jealousy lest the powers of the United States might, from the general language of the Constitution, be construed so as not to provide, in that Government, the security for their liberties which the people had provided in the State Constitutions.

The Bill of Rights prefixed to the original Constitution of Virginia, which was passed June 12, 1776, a short time before the Declaration of Independence was perfected, contains these declarations: —

"That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

"That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

"That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."

"That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."

In the Declaration of Rights adopted in North Carolina, December 17, 1776, are provisions, —

"That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

"That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."

"That every freeman restrained of his liberty, is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed."

"That the freedom of the press is one of the great bulwarks of liberty, and, therefore, ought never to be restrained."

In the "Constitution or form of government" of that State, ratified in open Congress the next day, is a provision, —

"That the Declaration of Rights is hereby declared to be a part of the Constitution of this State, and ought never to be violated on any pretence whatever."

There are other provisions in the Declaration similar to those in Virginia.

The Constitution of South Carolina adopted on the 19th of March, 1778, contains some provisions of a similar character.

The Declaration of Rights in the Constitution of Massa-

chusetts, adopted in 1780, has more ample and specific provisions for the security of liberty, among which are, —

"Each individual of the society has a right to be protected by it, in the enjoyment of his life, liberty, and property, according to the standing laws." . . . . "And whenever the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor."

"No person shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him; . . . . and no person shall be arrested, imprisoned, or despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

"Every person has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions."

"The liberty of the press is essential to security of freedom in a State; it ought not, therefore, to be restrained in this Commonwealth."

"The people have a right to keep and bear arms for common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained, without the consent of the Legislature; and the military power shall always be held in exact subordination to the civil authority, and be governed by it."

"In time of peace, no soldier ought to be quartered in any house, without the consent of the owner; and in time of war, such quarters ought not to be made, but by the civil magistrate, in manner ordained by the Legislature."

"No person can, in any case, be subjected to law martial, or to any penalties or pains by virtue of that law, (except those employed in the army or navy, and except the militia in actual service,) but by the authority of the Legislature."

Such are some of the provisions of State Constitutions, adopted during the Revolutionary War.

We have but to look at the ratifications of the Constitution of the United States, collected in Elliot's Debates, to be satisfied where the amendments came from, what was their origin, and that they are applicable to a time of war. In truth the amendments themselves completely negative the position that the provisions cited by the author of the pamphlet are not applicable to a time of war, showing, as

some them do, by their express language, that they were designed for time of war, as well as for time of peace.

One fallacy in the reasoning which suspends the rights of the citizen under the Constitution of the United States in time of war, is in taking the distinction between the *time of peace* and the *time of war*, — (the constitutional guarantees being operative and applied in time of peace, but being regarded as inoperative and inapplicable in time of war,) — instead of making the distinction between the *places and persons involved in the war*, and those *not within the limits of military occupation and actual hostilities.* The rebel, with arms in his hands, may be shot down without further legal process, because the laws of war apply to him, and do not require other process. The loyal citizen who is so unfortunate as to have his habitation within the theatre of actual war, is subject to the law of force, which authorizes the occupation of his house and grounds, and denies to him freedom of speech, and a right to keep and bear arms. But the existence of a state of war, under which actual hostilities are waged in one part of the country, furnishes no reason why peaceable citizens at a distance from the theatre of war should be subjected, in the language of the author, to the pleas of "batteries and gunboats and arguments of hot shot," so that when the "fearful execution" of the Commander-in-chief "is levied on the body, all that is left will be for the undertaker." Nor does it furnish any reason why a peaceable citizen, in no way involved in the actual hostilities, with no arms in his hands, and with no means of obstructing the military operations, should be deprived of the rights guaranteed to him by the Constitution; be seized, without process, upon the accusation of some irresponsible and unscrupulous partisan, — immured in a dungeon, held without trial, and against his attempts or those of his friends to have an inquiry made into the cause of his imprisonment; with no opportunity to meet a charge against him, and to vindicate his innocence; and until it shall please some irresponsible power to order his release.

Again: The author quotes what he denominates a severe rule of belligerent law, to wit: —

"Property of persons residing in an enemy's country is deemed, in

law, hostile, and subject to condemnation without any evidence as to the opinions or predilections of the owner."

And thereupon he adds: —

"If he be the subject of a neutral, or a citizen of one of the belligerent States, and has expressed no disloyal sentiments towards his country, still his residence in the enemy's country impresses upon his property, engaged in commerce and found upon the ocean, a hostile character, and subjects it to condemnation. This familiar principle of law is sanctioned in the highest courts of England and of the United States, and has been decided to apply to cases of *civil* as well as of foreign war."

And he says further: —

"Thus personal property of every kind, ammunition, provisions contraband, or slaves, may be lawfully seized, whether of *loyal* or *disloyal* citizens, and is by law *presumed hostile*, and liable to *condemnation, if captured within the rebellious districts.*"

This is put, as you perceive, as if the rule referred to were the same on land as on the ocean; whereas, in truth, the right of capture and confiscation, on the presumption of enemy's property, is a rule of maritime warfare, and does not in any manner apply to property found on land. So far from it, that the general rule does not recognize the right to capture and confiscate, on the ground of capture, the private property of individuals on land. General Halleck, who ought to be admitted as good authority in this instance, says: —

"Private property on land, is now, as a general rule of war, exempt from seizure or confiscation; and this general exemption extends even to cases of absolute and unqualified conquest. Even where the conquest of a country is confirmed by the unconditional relinquishment of sovereignty by the former owner, there can be no general or partial transmutation of private property, in virtue of any rights of conquest." *Halleck's International Law*, 456.

In discussing the power of Congress, the author asserts that it does not follow, that because Congress has power to abrogate the claims of slaveholders, the President, as Commander, may not also do the same thing.

It would be difficult, upon the ordinary principles of law, to maintain concurrent powers, unless the principle were also

adopted that the exercise of power by one, in relation to a particular subject-matter, ousted and took away the power of the other over the same subject-matter. It would be difficult to maintain that while Congress legislated against the rebels as traitors, and provided for their punishment as such, the President might recognize them as belligerents in such a manner as to abrogate the provisions of the Constitution, and the preceding legislation of Congress. But the author finds no difficulty in maintaining the omnipotence of the President, in regard to the emancipation of slaves, at the same time that he maintains the right of Congress to judge and determine whether such a necessity has occurred as requires and authorizes such emancipation.

The chapter on the war powers of the President, opens with a somewhat bolder tone, with more of bare assertion, and less of an attempt to cover his positions by the sophistry of an argument. The power asserted for the President is, in terms, more especially one for the emancipation of the slaves. It is alleged that, —

"the power of the President, as Commander-in-chief of the army and navy of the United States, when in actual service, to emancipate the slaves of any belligerent section of the country, if such a measure becomes necessary to save the country from destruction, is not, it is presumed, denied by any respectable authority."

"The Constitution confers on the Executive, when in actual war, full belligerent powers; the emancipation of enemies' slaves is a belligerent right. It belongs exclusively to the President as Commander-in-chief, to judge whether he shall exercise his belligerent right to emancipate slaves in those parts of the country which are in rebellion. If exercised in fact, and while the war lasts, his act of emancipation is conclusive and binding forever on all the departments of government, and on all persons whatsoever."

You are aware of the course of argument which is resorted to whenever an attempt is made to controvert this assumed power. The attempt is treated as if the denial of the right was equivalent to a claim of some rights and privileges for slavery, which do not attach to other species of property; and thereupon the objector is subjected to a certain course of denunciation and vituperation. But in fact the argument against the right to emancipate is not founded on any

peculiarities arising from the relation of master and slave, which distinguish that species of property in regard to the power of Congress or the President, from other descriptions of property, or that relation from other domestic relations, under the laws of the State. This is doubtless more extensively known than acknowledged. Let it be understood, then, if it may be, that the war power asserted on the part of the President, in this respect, is a power which may equally well be exercised over any other description of property, real or personal.

The President derives his office, and his powers in the execution of that office, from the Constitution. Some of those powers are derived from express grant, and others may exist by implication, or as incident to powers expressly granted. It is or ought to be well settled, that where a power is granted without any restriction or limitation upon it, whatever is necessary to the exercise of the power is granted with it. It is to be noted, however, that this last principle extends only to what is necessary and appropriate to the case. "The Government of the United States can claim no powers, which are not granted to it by the Constitution; and the powers actually granted must be such, as are expressly given, or given by necessary implication." "In the interpretation of a power, all the ordinary and appropriate means to execute it are to be deemed a part of the power itself."

The provisions of the Constitution which have been cited, as sustaining the unlimited powers claimed for the President, are, that the Executive power is vested in the President, — that he is required to take an oath that he will faithfully execute the office of President of the United States, and will to the best of his ability preserve, protect, and defend the Constitution, — that he is Commander-in-chief of the army and navy, and of the militia of the several States when called into the actual service of the United States, — that he shall take care that the laws be faithfully executed, — and that the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, public safety may require it.

These provisions are referred to by the author of the pamphlet.

It need not be argued that the "Executive power of the President" is not an unlimited, or, of itself, even a very extensive war power.

The oath is an official oath. The official oath of other officers is to support the Constitution. His is to preserve, protect, and defend it. The reason of the difference probably is, that as Chief Executive Magistrate, and as Commander-in-chief, the power through which the Constitution is to be preserved, protected, and defended, in accordance with, and in pursuance of, the laws of the United States, is placed in his hands. The oath does not enlarge his powers.

As Commander-in-chief he is to do what a Commander-in-chief under a government of laws ordinarily does according to law, being subject always to any constitutional or legal restrictions imposed upon a Commander-in-chief under the Constitution. What a Commander-in-chief in England, — in the country from which we derive the great principles which lie at the base of our free institutions,—is accustomed to do in the execution of his office, the President as Commander-in-chief may do, unless there is some constitutional or legal restraint, modifying his power.

The provision that he shall take care that the laws be faithfully executed imposes a duty, rather than confers a power. The duty carries with it, as an incident, the power to use the means necessary for the purpose, so far as the Constitution and laws have provided those means, — no farther. The duty is not to make any laws, but to enforce those which are made by the legislative department.

It is apparent from this examination, that neither by virtue of his power as President, — nor of his oath to defend the Constitution, — nor of his office as Commander-in-chief, — nor of his duty to take care that the laws be faithfully executed, — has the President any powers which conflict with other provisions of the Constitution, or, which can be lawfully exercised in the subversion of those provisions, or in the destruction or change of the rights and institutions of any State.

The arguments for this presidential power, are founded, substantially, upon an allegation of "military necessity,"

and an assumption that the President is the sole judge when a military necessity exists, and what is required by it; — always provided, it should be added, that he judges according to the wishes and purposes of those who assert the existence of the power, and urge him to use it.

I have thus endeavored to expose some of the fallacies of this elaborate argument in favor of a despotic emancipation. It is a tissue of miserable sophistry, bad law, and, if possible, worse logic.

On the basis of this argument, anything may be made a military necessity. One alleged necessity is as good as another, — the President being the sole judge. And the formula of denominating any measure proposed to be adopted, "a military necessity," being a mere matter of form, may soon be dispensed with, and the doctrine boldly promulgated that all the measures to which the persons in power see fit to resort must receive an unconditional support, with no doubt expressed of their constitutionality, on pain, at least, that any recusant shall be denounced as "disloyal."

I do not propose to present other arguments to show that there is, and can be, no such right as is claimed; having endeavored to do that, somewhat at large, upon another occasion.*

**Letters to Rev. Leonard Bacon, D.D.*—Having recently, in those letters, discussed the power of the President to emancipate the slaves, I should not have taken the trouble to expose the fallacies of this pamphlet, (although it places the right upon very different grounds from those assumed by the Reverend Doctor,) were it not for the sanction given to it by the War Office, in employing its author as the legal adviser of that department; and the persistent attempts which have been made to commend it to public notice, and to disseminate its doctrines, by a multiplication of editions, and by the weekly commendation of its author's great knowledge of constitutional law, and of his exceeding patriotism in accepting political office; — of which the following, from a Boston newspaper, may serve as specimens. It might save some labor, if the first and second were stereotyped, and inserted "once a week till forbid."

"William Whiting, Esq., who has been appointed Solicitor of the War Department, is the well-known patent lawyer of this city, and a man of fine legal attainments, and well versed in constitutional law. Unlike some so-called constitutional lawyers, he believes that the Government has power to preserve itself, and has rights superior to those of armed rebels. A

It is sufficient, at this time, to say, that no such power, by the mere force of a proclamation of general emancipation, can be derived from any belligerent right, or any right of conquest, or from any argument regarding what may be done in relation to other property.

My opposition to this alleged power is, in no degree, founded upon the object proposed to be accomplished by its exercise. Nor is it, merely, that it is without warrant, and unconstitutional. But it is, moreover, and beyond all this, that a single usurpation, whatever it may be, if once admitted as a constitutional exercise of authority, is fraught with danger to the republic.

There was among the highlands in the town of Glover, Vermont, a placid lake, which, confined within its natural boundaries, served the beneficial purposes for which its Creator designed it. Some unauthorized persons dug a channel from it, and set a small stream of water in motion through this irregular outlet. The barrier once broken, the water tore away the adjacent banks, increased in volume

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pamphlet from his pen, recently published, discussing 'The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason, and Slavery,' has attracted much attention."

"*William Whiting.*—Patriots are too valuable in these days to permit those who are meritorious to pass unnoticed. Among the many instances of devoted patriotism, we know of no one who has sacrificed more of personal interest, or rendered more valuable service to the Government, than William Whiting of Boston. From the purest of motives he has left a lucrative business, and all the comforts of a home in Massachusetts to serve his country in a capacity near to the President, and which involves the most delicate, and at the same time, important responsibilities. For his services he asks no compensation, and by no ordinary means will he ever receive anything like pecuniary consideration for what he is doing for the Government. We have means of knowing, that since his residence in Washington, his influence as a bold and manly advocate of his country's cause, aided by his bright example of self-sacrifice, has given him prominence that few men can reach in a lifetime. We sincerely hope that his labors will continue to be as valuable to the public as they are at present, and that our distinguished friend will see no cause to regret their liberal bestowal."

"*Personal.*—WASHINGTON, April 3. Hon. Wm. Whiting, Solicitor of the War Department, while on his way North, was recalled to Washington on important public business last night. He will leave for Boston on Monday next."

by its own violence, and the whole lake was precipitated upon the country below, carrying terror and devastation in its course.

The Constitution of the United States confines power within its appropriate limits. The question of the day seems to be, whether its limitations and guarantees are like the sandy banks of the lake in Glover. If the barriers shall once be broken, that question may be solved by the ruin and destruction of the liberties of the people.

If one usurpation of power is tolerated, —

> "'T will be recorded for a precedent;
> And many an error by the same example
> Will rush into the State; it cannot be."

We have most ample warning to beware how we sanction the exercise of unlawful power.*

The President on the 24th of September, two days after the proclamation of emancipation, issued another proclamation, in which it was ordered, —

1st. "That during the existing insurrection, and as a necessary measure for suppressing the same, all rebels

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* The evidence that the "great proclamation" is destined to the ignominous fate of accomplishing nothing, and of being construed into a humbug, accumulates from day to day. Hon. Richard H. Dana, Jr., District Attorney of the United States for the district of Massachusetts, is reported to have said, in a recent speech at Providence, R. I., —

"Do you object to the proclamation of emancipation? Do you know what it is? Republicans, cabinet ministers, differ as to its meaning and probable effect. That an army may free the slaves of the enemy, is a settled rule of war. The rebels must expect this. Their conduct has made it necessary and right to do so. But if any man fears or hopes that the proclamation did, as matter of law, by its own force, alter the legal status of one slave in America, on the first of January last, in my private judgment, he builds his fears or hopes on the sand. It is a military act, and not a decree of a legislator. It has no legal effect, by its own force, on the status of the slave. What is done by the strong arm is done, what the arm of force does not do, is not done. That is the nature of a military act. Its moral effect, as a threat or promise to the master or slave, the probabilities of its advancing an actual emancipation, I do not speak of. I speak of its legal effect on the legal status of a slave who is not freed in fact by the act of superior force. I say this, because I do not wish to see mistakes entertained, to see a good cause put on a false principle."

and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to the rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commission."

2d. "That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority, or by the sentence of any court-martial or military commission."

This purports, as you perceive in the first clause, to subject to martial law, and to trial and punishment by courts martial or military commissions, the persons mentioned in it, throughout the United States. It has been regarded, therefore, as a proclamation of martial law over the whole of the United States, and was probably so intended. But before proceeding to inquire and consider by what authority the President assumes the right to proclaim martial law over the whole Union, it may not be amiss to say, that the document construed according to its terms, and according to what was probably designed to be its practical application, is not of that character.

It is of the nature of martial law, that wherever it exists it is the governing power, and suspends the municipal law. It is the law of the district or place where it is in operation. It is not military law, merely, for the government of the armed force, according to some statute or military regulation. But it is the law of force, which the commander applies according to his will, subject to the limitation that he is not to depart from the proper object and purpose of it, — that is, military rule for the time being. It is not necessary to its existence that the municipal law should be subverted entirely, but so far as municipal law furnishes the rule of action, it is by the permission of the governing military force.

A proclamation that the whole United States should be governed by the law of force, would be preposterous, or, if made effective, would subvert the Government.

Besides, it is not in the nature of martial law to exist where there are no military forces in camp or in the field. Mr. Justice Woodbury, in Luther *v.* Borden, 7 Howard, 83, admitted that a commander might extend certain rights of war, not only over his camp, but its environs and the near field of his military operations. But no further nor wider. And he said, "But in civil strife they are not to extend beyond the place where the insurrection exists. Nor to portions of the State remote from the scene of military operations, nor after the resistance is over, nor to persons not connected with it;" adding, "Nor, even within the scene, can they extend to the person or property of citizens, against whom no probable cause exists which may justify it."

It is the nature of martial law to be in force territorially; not as the rule by which a few persons scattered through the community are to be governed, without any possible knowledge on their part whether they are living under martial law, liable to arbitrary arrest and trial by a military commission; or whether they are under the municipal law with its guarantees of liberty and personal safety.

But this proclamation is an order that certain persons, or classes of persons, designated only by their supposed acts, are subject to martial law. And in relation to some of these classes, the persons to be subjected to arrest and military trial cannot have any knowledge that the sword is suspended over them, by a single hair, until it falls with fatal effect upon them.

Persons guilty of any disloyal practice or of affording aid and comfort to the rebels are thus subject to arbitrary seizure. If it was to operate only on those *actually* guilty of such offences, it might be said that their own consciences would inform them of their liability. But we know that, if attempted to be enforced, this cannot be its operation. It is to operate on any person who may be *accused* of a disloyal practice, or of giving aid and comfort.

Two days after this proclamation was issued, the Secretary of War promulgated a military order for the appointment of Provost Marshals, who are to arrest, on the warrant of the Judge Advocate, among others, all disloyal persons subject to arrest under the orders of the War Department, and to perform such other duties as may be enjoined upon

them by the War Department. If the War Department pleases to call any person disloyal, he may be arrested. If, under general orders of the War Department, the Judge Advocate pleases to regard any person as disloyal, his warrant consigns that person to the dungeon of some fort, without the benefit of *habeas corpus* or trial, or inquiry, until it shall please somebody to release him.

No person is subject to martial law under this part of the proclamation, until the order of the War Department or the sign-manual of a Judge Advocate to a warrant designates him as a subject of it. Up to that time he is in the peace of God, and the State. The warrant of the Judge Advocate changes the governing power over him. He is to be tried, if ever tried, at the pleasure of somebody, under martial law, for acts done, or perhaps for words uttered, while he was under the protection of municipal law, against which he had committed no offence.

Now suppose the President, leaving out of the proclamation the words "shall be subject to martial law," had ordered that all persons who shall be arrested upon the warrant of a Judge Advocate, shall be tried by a military tribunal, and punished at its discretion, can you imagine a more despotic and arbitrary governing power than would exist under such an order, if it were carried into execution? And yet such is precisely the nature and character of this part of the proclamation, for the words "shall be subject to martial law," do not operate in any manner to change its character or vary its effect.

But concede, for the sake of the inquiry into its validity, that this is a proclamation constituting martial law, as the governing power, not merely over any individual who may be so unfortunate as to incur the suspicion of a Judge Advocate, but over some territory. That territory is the whole United States. There is nothing to limit it. And then comes the inquiry, by what authority does the President assume to establish martial law over entire States, where there is and has been no rebellion; within the limits of which there has been no war nor danger of war, nor any danger of resistance to the due and full execution of the laws of the United States?

There is nothing in the language of the Constitution to show the existence of such a power. Suppose the President as Commander-in-chief possesses what is called the war power; still the question remains, — is it within the authority of a Commander-in-chief to extend martial law over the whole country. There is nothing in the history of the States after the Revolution and before the adoption of the Constitution to show that it existed there, and has been thence transmitted. There is nothing in the authority of the colonial governors to show that it is derived by inheritance from them, even, if the succession had been somewhat more regular than history shows it to have been. It is not to be found existing in some authority in Great Britain, before the Revolution, under such circumstances as may serve to give a construction to the war powers here, under which it is claimed. We are entirely at fault in any attempt to trace its existence there in such shape that it may serve as an argument for its existence here.

By the British Constitution, the King is generalissimo of the forces. There are some authorities to show that the King may, in case of necessity, proclaim martial law. It is not quite clear, perhaps, whether this is by virtue of his prerogative, or whether it is a mere act of power, not strictly within the prerogative. Blackstone says, —

"That in the exertion of those prerogatives which the laws give him, the King is irresistible and absolute, according to the forms of the Constitution. And yet, if the consequence of that exertion be manifestly to the grievance or the dishonor of the kingdom, the Parliament will call his advisers to a just and severe account. For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent; if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner." 1 Bl. Comm. 251.

In a debate in the House of Commons, in 1801, Lord Castlereagh said: —

"I perfectly understand that the prerogative of the Crown authorizes those acting under its authority to exercise martial law. I maintain that it is a constitutional mode for the executive government to exercise martial law in the first instance, and to come to Parliament

for indemnity afterwards, and is preferable to applying to Parliament first. I am the more anxious to assert this proposition, because, by so doing, I render justice to the Irish government." . . . "The rebellion in Ireland broke out in May, 1798; the executive government published a proclamation of martial law; they proceeded from May, 1798, till 1799, exercising martial law wherever rebellion existed, without any express law for that purpose. They did it on the principle, that they were authorized by the King's prerogative, provided they did not transgress the necessity of the case; and sure I am that nothing could have induced them to have departed from the strict constitutional system, but that they felt they must deny to a great part of the country the advantages of the civil law, unless it were incorporated with the martial law. The two systems existing at the same time, led to such a conflict of jurisdiction that it was impossible to give effect to either."

But Mr. Grey (afterwards Earl Grey) said of the pending measure: —

"It was better that the executive government should resort to what had been called (he thought not legally) its prerogative of proclaiming martial law. That was no prerogative of the Crown, but rather, an act of power sanctioned by necessity, martial law being a suspension of the King's peace." *Hansard's Parl. Hist.*, 1801, Vol. 35, pp. 1013, 1018, 1024.

It is quite immaterial to the purposes of our inquiry, whether it is by virtue of prerogative or as an act of power, that martial law may be declared in Great Britain by the Executive; for whether it be the one or the other, it is evident, from these extracts, that it is not an absolute right, but it is dependent upon the ability of the ministers to satisfy Parliament of the necessity under which the act was done. If they succeed in this, they obtain an act of indemnity, which is a sufficient protection to them, Parliament having unlimited power in this respect. If they do not succeed, they stand liable to impeachment at least, because the necessity did not exist in which the prerogative could be exercised, or the act of power be justified, whichever way it is regarded. This shows that the act is originally not a legal exercise of authority, for if it were so, no act of indemnity would be required. It appears to stand like proclamations, or orders in council, in relation to matters of revenue, impor-

tation and exportation of grain, &c., not in accordance with existing statutes; — which orders are not seldom issued in the recess of Parliament, but an act of indemnity is uniformly applied for, without which it seems to be understood that the act, if not absolutely illegal, is without sufficient justification.

This mode of proceeding, then, with this responsibility of ministers attached, may be regarded as part of the British Constitution. But it is quite evident, (whether regarded as an exercise of prerogative, or as an act of power,) that it furnishes no precedent for the exercise of a similar authority by the President of the United States, who has no prerogative; nor can it furnish any argument to give a construction to any provision in favor of such power, nor can Congress, which is not omnipotent, by subsequent legislation, change the nature of past transactions.

It is no part of the Constitution of the United States that things may be done as an act of power, without right at the time, but dependent for justification upon a subsequent Congressional sanction.

If there are any persons at the North who should be arrested without warrant, and tried by a military commission, they are the ultra politicians who not only sustain all these assumptions of power, and contend that they are fully warranted by the Constitution, but who also give aid and comfort to the rebels by reiterated representations that all those who oppose such assumptions are the friends of the rebellion, and of the rebels, and desire their success, or seek a peace which shall give new guarantees to slavery. Some of them may be weak enough not to see any difference between a support of sound constitutional law, and a support of the rebellion, but this credit for simplicity cannot be extended to the leaders in the misrepresentation, which I doubt not has done more to encourage the rebels in their determination to fight on than all the munitions of war which have been supplied to them from the North, not to say from all Europe besides.

A farther inquiry arises, by what authority does the President assume the right to suspend the writ of *habeas corpus* throughout the United States, by a proclamation?

For the purpose of the argument, I am willing to admit that the provision of the Constitution in these words, "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it," — refers not to a suspension of the right to issue the writ, but to a suspension of the duty to make return to it, when it has issued. If it were the former no doubt would exist that the President has no authority to repeal a law of Congress providing for the issue of it, or by any order to suspend the operation of that law.

But on the construction that the suspension referred to in the Constitution is a suspension of the duty to make a return to the writ; — from whence does the President derive the power thus to invalidate the operation of the writ when duly issued, by an order or proclamation that the writ is suspended?

The Act of Congress of 1789, chap. 20, "to establish the judicial courts of the United States," provides, —

"Sect. 14. That all the before-mentioned Courts, [Supreme, Circuit, and District] of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment, — *provided*, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The command of the writ issued under this legislation of Congress is imperative in its form, and equally so in substance, unless some valid reason exists for refusing obedience. Is the proclamation of the President a sufficient reason, which the Court or Judge should receive, as the justification for a refusal, which, if valid, condemns the prisoner to continued incarceration, for an indefinite period, by a power legally irresponsible, without any opportunity to have an inquiry into the justice, or even into the cause, of that

imprisonment, — which condemns a man, arrested without any complaint on oath, or any specific charge against him, but upon a mere suspicion perhaps of unfriendly feeling towards some Secretary, or other official, — (peradventure upon no suspicion at all, but because there is a chance to "feed fat some ancient grudge against him,") — to a dungeon, which, so far as any one knows, may prove another Bastile, from which he will emerge only by being carried to his grave? It is idle to say that this is the mere figment of an excited imagination. The result is involved in the principle that the President may suspend the *habeas corpus* at his pleasure, in time of war, by proclamation, — whenever an unscrupulous politician shall administer the Government with the powers which are now said to be legitimate and lawful in the President, under the Constitution.

If it be said that the same result may be attained through a suspension by an act of Congress, it may be answered that the members of Congress are elected for a short term, — that the passage of an act of suspension requires the concurrence of a majority of both Houses, as well as the sanction of the President, — and that there is much less danger of abuse in this mode, than there is if the power were confided to a single person. An act of Congress could hardly be passed without a limitation of the time of suspension to a short period, at the expiration of which the question of the necessity of renewal must necessarily be considered. If it be said that this might cause delay, let the answer be that what has been found sufficient in England, for nearly two hundred years, may be supposed to be sufficient in this country.

I cheerfully admit that martial law, wherever that law has a legitimate operation, suspends the privilege of the writ, because martial law is the law of force, and supersedes the municipal law. I have endeavored to explain and maintain this doctrine in an extended discussion of the principles involved in it.* But this is entirely irrespective of any action

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* See *North American Review, October*, 1861. *Article:* "*Habeas Corpus and Martial Law*," which was issued immediately afterwards in a pamphlet form. It has been a matter of surprise to the author, to learn, that in several instances, that article has been supposed to maintain the right of the Presi-

of the President, except as he puts the troops in the field, and may direct their movements. He may thus mediately be instrumental in introducing martial law into a particular locality, that is, by ordering the military force there for the purposes of the war; and he may thus be remotely the cause of the suspension of the writ there. But all this has nothing to do with a proclamation suspending the writ in places where there is no active war, and no military force for the immediate purposes of the war.

Two opinions from very distinguished sources have maintained the right of the President to suspend the privilege or execution of the writ. They differ, however, materially, in the grounds upon which the power is to be sustained. — One, by the Attorney General of the United States, places it substantially upon the duty of the President to see the laws executed, arguing that the President and the Judiciary are coördinate departments, — that the President has authority to interpret the Constitution in what regards his powers and duties, — that he is sworn to preserve, protect, and defend it, — that it is made his duty to take care that the laws are faithfully executed, — that in the performance of the duties thus imposed, he may find it both prudent and humane to arrest and imprison spies and emissaries, either for punishment or for the purpose of holding them in custody and rendering them harmless; and, having so arrested them, that he is fully justified in refusing to obey a writ commanding him to produce the body of a prisoner, to state when he took him and by what authority, and for what cause he detains him, and then submit himself to judgment, — and on this course of reasoning, the conclusion is drawn, that he has the

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dent to suspend the privilege of the writ. Such a conclusion could not have been the result of a careful perusal. The design of the article was to show that there might be a suspension by the operation of martial law, without any order for the purpose, and that General Cadwalader's refusal to make a return in Merryman's case was justifiable on that ground; and this for the very reason that the author was not prepared to admit the right of the President to order a suspension. *See note to article on "Constitutional Law," North American Review, April*, 1862, *and note to article on "The Character of the Rebellion and the Conduct of the War," North American Review, October*, 1862.

lawful power to suspend the privilege of persons arrested under such circumstances.

The other is by the Hon. Horace Binney of the Philadelphia Bar, who rests the argument, substantially, upon the position that the clause in the Constitution, providing that the writ shall not be suspended, &c., is a grant of power of suspension, and that this power is by the grant vested in the President, — arguing that the power to imprison, and to deny or delay a discharge from imprisonment, is an Executive power, — that the clause in the Constitution is elliptical, and that when the ellipsis is supplied it reads thus, — "the privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it, *and then it may be suspended;*" — that "it will be of perfect equivalent import and effect if the clause be transposed as follows: 'the privilege of the writ of *habeas corpus* may be suspended in cases of rebellion or invasion, when the public safety may require it; and it shall not be suspended in any other case;'" — that the clause gives the power to suspend the privilege, in the cases conditioned, — that the suspension of the privilege under this constitutional power becomes an Executive act, and not a legislative act, — and that the fact of rebellion and what the public safety requires to the defeat or suppression of the rebellion, are of Executive cognizance and decision, and of execution, also, to the whole extent of the lawful means of that department. — These are some of the principal positions from which, through a very ingenious argument, the deduction is drawn "that the power of suspending or denying for a season, the privilege of the writ of *habeas corpus* in time of rebellion, is a most reasonable attribution to the Executive power, such as the Constitution of the United States has made it; and so indispensable to that branch of the Government, that, without it, the very arms of the Government might be baffled and its worst enemies escape."

It well becomes any one to pause before he presumes to differ from gentlemen to whose opinions great deference is unquestionably due; but the difference between them, respecting the foundation upon which the power is to be

placed, indicates that both opinions are not entirely sound, and we must choose between the two, or seek some other solution of the vexed questions which are presented to us. Owing to the material difference of view, each of these opinions must to some extent neutralize the other. This consequence is not the less effective from the great weight deservedly attached to each, separately. There is, then, something in the nature of what lawyers call an estoppel against an estoppel, which, according to the legal maxim, sets the matter at large; — that is to say, in this case, leaves us at liberty, with the most perfect respect, to object to the soundness of both opinions, and opens the matter to further discussion.

It might be sufficient to say, in relation to the first of these opinions, that the considerations already suggested in relation to the power of the President, regarding emancipation and martial law, furnish an answer to the propositions upon which it is based. We may add that, — the Constitution has imposed no duty upon the President which requires him to do anything contrary to its provisions; — and that the amendments to that instrument, made for the purpose of securing personal liberty, are limitations upon his power, as well as upon the power of Congress. It must be shown that the Constitution confers a power upon him, before it can be determined that he is to exercise that power in supporting the Constitution.

Any other doctrine gives him, immediately upon the breaking out of a war, the powers of a Dictator, which is in violation of the whole character of the Government. The President is not to preserve the Constitution, in a constitutional manner, by violating it himself. He is not to see that the laws are executed, by committing the first breach, and this under the authority of the Constitution. It is not sufficient to say that, in the opinion of the President, the safety of the country requires the exercise of such powers, and therefore they are constitutional.

The remarks which follow are more particularly applicable to the second opinion, but they may serve to some extent as answers to both.

Neither of these opinions finds anything in the common

law, or in the history of the writ in England, to sustain such an Executive power; and the latter not only discards English analogies, but protests against their application. It seems to be impossible, however, to discuss a subject which had its origin in the principles of English freedom, and is derived from English law, — which was regulated by that law at the time of the settlement of this country, the free principles of which the emigrants claimed as their birthright, — and which during the existence of the colonies was almost, if not entirely, regulated by the laws of England, as they were applicable to the Colonies, — without a constant reference to the principles of that law, and the practice there in relation to the subject-matter, and a free use of the analogies, which are surely strong, if not controlling, for the purpose of determining not only the nature and character of the writ, but the limitations, also, to which experience has shown it may properly be subjected, and furthermore the source from which any interference with its operation may safely be derived.

It is quite clear, as is very distinctly and emphatically admitted in the latter of the opinions just referred to, that there is nothing in the laws and practice of England which in any way countenances the exercise of an Executive power of suspension. On the contrary, all the analogies derived from that quarter are entirely adverse to it; and I shall endeavor to show that they have a legitimate operation in determining the true construction of the clause in the Constitution, and thus settling the question of an Executive power.

Anterior to the statute 31 Charles II. commonly called the *Habeas Corpus Act*, there is no lack of precedents for the exercise of acts of arbitrary power. That Statute was designed to secure the people against its exercise. Since the revolution of 1688, there has been, so far as I am aware, no claim of power on the part of the crown to suspend the execution of the writ in criminal cases, and certainly there could not be, consistently with the provisions of that statute. There have been numerous suspensions since that period, uniformly by acts of Parliament, all, or nearly all, for very short periods; continued, however, in some instan-

ces, by repeated enactments, for a series of years. Two instances occurred in the 1 *William and Mary*, chap. 2 and 7, each entitled " An Act for empowering His Majesty to apprehend and detain such persons as he shall find just cause to suspect are conspiring against the government." 9 *Statutes at Large*, 35.* An act with a similar title, 17 *George* II. chap. 6, recited that the nation was threatened with an invasion by a French power, in concert with persons disaffected at home, and provided that persons in prison might be detained for treason or suspicion, &c., until the 29th April, 1744. It suspended an act " against wrongous imprisonments in Scotland." 18 *Statutes at Large*, 163. An Act, 19 *George* II. chap. 1, with a similar title, recited that a wicked and unnatural rebellion is begun, and now carrying on in that part of this kingdom, called Scotland, by divers of His Majesty's subjects, encouraged by his enemies abroad, in order to set a popish pretender upon the throne; and provided that persons imprisoned for suspicion of high treason, might be detained without bail until the 19th of April, 1746, and suspended also the Scotch act for preventing wrongous imprisonments. The act was to be in force until the 19th of April, 1746, and no longer. 18 *Statutes at Large*, 397. The next instance occurs in the time of the American Revolution, 17 *George* III. chap. 9, entitled " An Act to empower His Majesty to secure persons charged with, or suspected of, the crime of high treason, committed in any of his Colonies or Plantations in America, or on the high seas, for the crime of piracy," which recited that " whereas a rebellion and war have been openly and traitorously levied and carried on in certain of His Majesty's Plantations and Colonies in America," &c. " and many persons have been seized and taken, who are expressly charged or strongly suspected of such treasons and felonies, and many more such persons may be hereafter so seized and taken; and whereas such persons have been, or may be brought into this kingdom, &c., and that it may be inconvenient to proceed forthwith to the trial of such crim-

* In the edition of the Statutes before me, these acts are marked " EXP.," to denote that they have expired, by their own limitation, and the titles only are given.

inals, and at the same time of evil example to suffer them to go at large." It was thereupon enacted that persons "seized or taken in the act of high treason, committed in any of his Majesty's Colonies or Plantations in America, or on the high seas, or in the act of piracy, or who are or shall be charged with or suspected of the crime of high treason, committed in any of the said Colonies, or on the high seas, or of piracy, and who have been, or shall be committed, in any part of His Majesty's dominions, for such crimes, or any of them, or for suspicion of such crimes, or any of them, by any magistrate having competent authority in that behalf," &c., "shall and may be thereupon secured and detained in safe custody, without bail or main prize, until the first day of January, one thousand seven hundred and seventy-eight, and that no Judge or Justice of the Peace shall bail or try any such person or persons without order" from the Privy Council, signed by six members, until said first day of January. It was provided that nothing contained in the act is "intended or shall be construed to extend to the case of any other prisoner or prisoners than such as shall have been out of the realm at the time or times of the offence or offences wherewith he or they shall be charged, or of which he or they shall be suspected." 31 *Statutes at Large*, 312. The provisions of the act as above recited may serve to show how carefully Parliament has guarded acts of suspension in recent periods. This act, which has been called a partial suspension, was continued from year to year until the 1st of January, 1783.*

A power to issue the writ under the colonial governments, and in the States which succeeded them, might well be derived from Magna Charta, the Petition of Right, the com-

* Several instances of suspension have occurred since the Revolution, with additional provisions in the acts of suspension. See 34 *George* III. ch. 54 (1794); 39 *Statutes*, 556; — continued by 35 *George* III. ch 3; 40 *Statutes*, 1; — 38 *George* III. ch. 36 (1798); 41 *Statutes*, 612; — continued, see 39 *George* III. ch. 15 and ch. 44; 40 *George* III. ch. 22; 42 *Statutes*, 133, 231, 495; — 41 *George* III. ch. 26; 43 *Statutes*, 67. Acts in relation to Ireland, 43 *George* III. ch. 116, 117; 44 *Statutes*, 710, 713; — 57 *George* III. ch. 3 (1817); 57 *Statutes*, 3; continued ch. 55, p. 193; — 3 and 4 *William* IV. ch. 4, § 31 (1833); 73 *Statutes*, 14; — 11 and 12 *Victoria*, ch. 35 (1848); 88 *Statutes*, 165.

mon law, and the statute of 31 Charles II. in amendment of the common law on that subject.

The early emigrants from England claimed the common law as their birthright. The Colonies were governed by the principles of that law, and Acts of Parliament in amendment of it, so far as those principles were applicable to their state and condition, and were not altered by local legislation.

The Declaration of Rights by the first Congress of 1774 asserted among other things, that the respective colonies were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the *vicinage*, according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their social, local, and other circumstances.

It is not material to the argument perhaps, but on the general principles just stated, the provisions of the statute of 31 Charles II. being in amendment of the law of *habeas corpus*, formed part of the law of the Colonies, and as such might have been, up to the time of the Revolution, the foundation of process in the courts of any of the Colonies in which no provision had been made by Act of Assembly, and perhaps afterwards in the States, in the absence of legislation.

Upon the formation of the Constitutions of the several States, it was competent for the people of each to regulate for themselves, so far as they pleased, the whole subject-matter of personal liberty, and the provisions for its security. So far as they refrained from introducing into their Constitutions any provisions affecting it, the matter was left to the control of the Legislature of the State, which might regulate the issue and suspension of the writ according to its sound legislative discretion.

No Constitution of that period, so far as I am aware, provided in express terms for any power to issue the writ; but without any such express grant of power, the Legislature had authority, either by the general grant of legislative power, or in the exercise of their duty to provide for the constitution of courts and the regulation of their jurisdic-

tion, to enact such laws upon the subject as the interests of the people seemed to require, and by subsequent acts to modify or repeal those laws, substituting other provisions. And it seems clear that with such general authority of legislation and with no constitutional restriction, it would have been competent for the Legislature to suspend the privilege of the writ to the extent that Parliament had done in several instances before and in the time of the Revolution, whether the suspension were regarded as a prohibition to issue the writ, or as a suspension of the duty to make a return to it. The complaints of the Colonies had not been of the action of Parliament in this particular; and, aside from constitutional provisions, the several Legislatures while under the Confederation had as ample powers over this subject-matter in their several States as Parliament itself had in England.

As it was not deemed necessary to introduce any express constitutional provision giving power to the Legislature to provide for the issue of the writ, no doubt could have been entertained that the Legislature would perform that duty in the first instance; and we should naturally expect that any express declaration found in a State Constitution would be restrictive of a power of suspension, lest in some time of excitement, or through some undue influence, the legislative power might be indiscreetly exercised in that respect.

The early Constitution of Virginia, adopted in 1776, contained, as we have seen, a provision, —

"That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

That of North Carolina, formed in the same year, has the same clause, and another in these words: —

"That every freeman restrained of his liberty, is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed."

The Constitution of Massachusetts, adopted in 1780, has a more specific clause, to wit: —

"The privilege and benefit of the writ of *habeas corpus* shall be

enjoyed in this Commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the Legislature, exeept upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months."

It is impossible to construe the foregoing provision of the Constitution of North Carolina as a grant of power to suspend the writ, for it recognizes no right of suspension, and seems to be entirely prohibitory of a power of suspension, which would have existed in its absence. In its effect it is like the provision in the Constitution of Vermont, to wit: "The writ of *habeas corpus* shall, in no case, be suspended;" which by no process of reasoning can be construed as a grant of a power of suspension.

If by possibility the clause in the Constitution of Massachusetts might be construed as a grant of a power of suspension, provided such construction was necessary in order to secure that power, it would very clearly be a violation of all right rules of construction, so to construe it, when, as has been shown, even a larger power of suspension would have existed in the legislature without that provision.

Now, the original proposition on this subject, introduced by Mr. Charles Pinckney on the 20th of August, 1787, into the convention which formed the Constitution of the United States, and which was referred to the committee of Detail, and for which was substituted the clause adopted as a part of the Constitution, is substantially like the restrictive provision in the Constitution of Massachusetts, and was evidently taken from it. It is in these words: —

"The privileges and benefits of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding months." *

* Mr. Binney, in his first tract on the subject, refers to a provision in what, according to the journal of the convention, is called Mr. Pinckney's "Draft of a Federal Government," which would appear to have been introduced May 29th, soon after the convention assembled. And he argues respecting the construction of the clause finally adopted from the paragraph on the subject in that draft, as if it were the original proposition.

It seems that Mr. Pinckney did, on the 29th of May, present a draft of

According to Mr. Madison's journal, it appears further that "On the 28th August, 1787, Mr. Pinckney, urging the propriety of securing the benefit of the *habeas corpus* in the most ample manner, moved: that it should not be suspended but on the most urgent occasions, and then only for a limited time not exceeding twelve months."

"Mr. Rutledge was for declaring the *habeas corpus* inviolate. He did not conceive that a suspension could ever be necessary, at the same time, through all the States."

Mr. Gouverneur Morris moved, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless where in cases of rebellion or invasion, the public safety may require it." *

"Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with Judges, in most important cases, to keep in jail or admit to bail."

"The first part of Mr. Gouverneur Morris's motion, to the word 'unless,' was agreed to, *nem. con.* On the remaining part, — New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, ay — 7; North Carolina, South Carolina, Georgia, no — 3."

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a Government, which, however, was not entered on the journal, and no copy of it was preserved in the files of the convention. Years afterwards when the journal was about to be published, what purported to be a copy of it was furnished to the Secretary of State. By whom, and under what particular circumstances this was done is not apparent. But it is very evident that it is not a copy of the draft originally proposed by Mr. Pinckney. Whether there has been an attempt surreptitiously to palm off a spurious document, or whether a wrong paper was furnished through mistake, I am unable to determine. But it is safe to conclude, that no "draft," the general features of which were so nearly similar in many particulars to the Constitution as finally adopted, could have been introduced into the convention at that early day, and especially by Mr. Pinckney. The arguments of Mr. Pinckney on several subsequent occasions were inconsistent with the supposition that he had at that time matured any such plan. The inconsistency is apparent in relation to this very subject.

The authenticity of the draft is entirely exploded in the Appendix to the Madison Papers, Vol. 3, No. 2.

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* There being a difference of opinion, Mr. Morris moved a more specific proposition, by way of compromise. It is fair to infer that the reference to the Legislature was omitted for the sake of brevity, being regarded as unnecessary.

It appears from these statements that the proposition as originally introduced into the convention had the character of a restriction upon the power of Congress, and not of a grant of power to any department. This character was not altered by the subsequent change which the proposition underwent before its final adoption. The remarks of Mr. Rutledge and Mr. Wilson show this. In fact, the very last action upon it by which the substitute of Mr. Gouverneur Morris was divided for consideration, and the first clause agreed to before the latter part was acted on, shows this very perfectly. As a clause of restriction it was susceptible of just such a division. But regarded as a grant of power, such a division would be ridiculous. Suppose the latter clause had been rejected, the provision adopted would then have stood: "The privilege of the writ of *habeas corpus* shall not be suspended."

There is nothing to indicate that the people, when they adopted the Constitution, placed any different construction upon it.

The new reading of the clause, by supplying an ellipsis where nothing is wanting, and then reconstructing the whole so that the clause has the appearance of a grant of power instead of a restriction upon a power assumed to exist, is exceedingly ingenious, but it is respectfully submitted that there is no sufficient warrant for it.

It is believed with great confidence, that there is no difference between the Constitution of the United States and the State Constitutions, which should lead us to any other result. It is true that neither the common law nor the provisions of the statute of 31 Charles II. were ever in force as a part of the law of the United States; and the privilege of the writ under the authority of the United States could not be derived directly from them. The government of the Union is a government of limited powers, having no common law, operative as such, notwithstanding that law is and must be continually resorted to, in order to determine the true construction of constitutional provisions and of the acts of Congress.

The right to the privilege of the writ, under the authority of the United States, must therefore be derived from some

express written law, or by implication from what is written. It is derived from the Constitution by implication, under the clauses providing that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish; and that the judicial power shall extend to all cases in law and equity arising under the Constitution and the laws of the United States, &c. These clauses gave Congress ample power to regulate the jurisdiction of the courts of the United States under the Constitution, and of course to provide for the issuing of the writ of *habeas corpus;* which power Congress exercised in 1789, by the express language of the 14th section of the Judiciary Act, which has been quoted. If Congress had not exercised the power, the courts could not have issued the writ. 4 Cranch 94, *Ex parte, Bollman & Swartwout.*

Congress having exercised this authority, thus derived by implication, had not exhausted its powers of legislation upon the subject. That body may repeal what it has enacted, and substitute other provisions. If Congress should repeal the law entirely, substituting no other provision, it might be said that, along with the implied power, there was a duty implied, which Congress had neglected. But if Congress should determine otherwise, although it might be thought that there was a dereliction of duty, the courts could not hold that the repeal was invalid, upon the ground that Congress had previously exhausted its power over the subject-matter.

In Mr. Binney's second tract on the subject, page 22, he says: —

"Nothing can be suggested in argument that is more licentious than the position that Congress, in the absence of the *habeas corpus* clause, would have had plenary and untrammelled power and discretion to suspend the privilege of the writ of *habeas corpus.*" And again: "What a caricature of argument it would be, to allege that the withholding, repealing, or suspending the writ of *habeas corpus*, is an appropriate means of constituting a judicial tribunal!"

This last remark may serve to sustain the position that the power to provide for the issue of the writ is well derived

from the power to constitute judicial tribunals. The first remark is somewhat strongly stated. It may perhaps admit of question. It might be more nearly correct, if the sole government of the country were that of the United States.

It may be true that the judicial power of the United States would not be as full and ample as it ought to be without authority in its judicial department to issue the writ. Perhaps no one would say that Congress had exercised its discretion wisely, if such provision was not made, but that is not the question. — If we discard English analogies, we discard the *habeas corpus* proper. Something else might be substituted of a different character, and with a different effect. If we apply the English analogies, they cannot lead us to the implication of an imperative duty upon Congress to provide for this writ by the mere authority to constitute courts; the common law and English statutes forming no part of the law of the United States. If the United States were the sole government of the country, that government being based upon the general principles of the English law, the English analogies might lead to a very cogent argument, that it was the duty of Congress, in regulating the jurisdiction of the courts, to provide for the great writ which secures personal liberty. But such is not the state of the case. With the exception of the District of Columbia, and the forts, &c., for which special provision exists, and the territories, (which Congress governs, under a provision of the Constitution authorizing that body to make rules, or from the necessity of the case, it is immaterial which,) the whole country is embraced in the States; and these States acting on the analogy of the English law, have constitutional and legal provisions, securing the *habeas corpus*. These State jurisdictions inquire into all unlawful imprisonment within their borders, and might, in the absence of an act of Congress, relieve from any unlawful imprisonment within their several jurisdictions. It would be no answer to the inquiry in a State Court, that the imprisonment was under claim of an authority from the United States, if the detention was unlawful. If it were lawful, the Courts of the United States, if they had the power, would not discharge the prisoner. A provision in the laws

of the United States on the subject is not, therefore, such a necessity, that its absence could be regarded as revolutionary, or as an absolute dereliction of duty by Congress.

It is in the power of Congress, then, having once made provision, — to modify, suspend, and even repeal, that provision without any violation of the Constitution. — But it is not necessary to dwell upon that point. It is sufficient that the power to provide for the issue of the writ, is derived from the power to constitute courts, and to regulate their jurisdiction; — that the duty so to provide, if such duty is to be implied, is derived from the principles of English liberty, and from the constitution and authority of the courts of that country, — that we receive our earliest ideas of the privilege of the writ from the English law, — and constantly resort to that law to determine questions arising in the administration of the jurisdiction; — and that it may, therefore, and it seems must, be concluded, that we cannot reject the English analogies on the subject of suspension. In other words, we may well maintain that Congress would have, but for the constitutional provision, a power of suspension, as an incident to the power to provide for the issue of the writ, equal to that exercised by Parliament before the Revolution. And in this view also, the clause in the Constitution cannot be construed as a grant of a power of suspension, but as a restriction of the power to the cases named.*

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* Mr. Binney suggests that after each case of suspension in England an act of indemnity has been passed, to protect those who have been concerned in arrests without legal process, the act of suspension merely authorizing the *detention* of the prisoners, but furnishing no exemption from liability for the previous arrest. If the acts of suspension do not justify arrests without a regular warrant from a magistrate, in England, an order of suspension by the President cannot do so. His power of suspension cannot be more potent than that of Parliament, nor the incidents attached to it greater. The arrest, therefore, would, notwithstanding the suspension, be unlawful, and the parties making it liable in damages, unless the proclamation of martial law furnishes a justification. That seems therefore to be the complement of the suspension. On this theory then, we reach the conclusion that, under the Constitution, the President, in case of invasion or insurrection, may govern the whole country by force, — by the strong arm, — whenever it pleases him so to do! It is the doctrine of "military necessity" in another form merely.

There are very honest persons, doubtless, who fail to see any violation of the Constitution, in an assumption of power on the part of the President, to emancipate all the slaves by a proclamation, coupled with a pledge of all the power of the Executive and of the army and navy, to sustain and enforce that emancipation; a great portion of which must take effect, if it ever takes effect, in time of peace, after the rebellion is suppressed; and this, notwithstanding it has been admitted for half a century, that there was no authority, on the part of the United States, to abolish or regulate slavery in the States. There are those who equally fail to discover any violation of the Constitution, in a proclamation purporting to subject certain classes of persons, throughout the United States, to arrest and punishment by martial law, notwithstanding they may reside hundreds of miles from any part of the country, where such a thing as legitimate martial law, under the Constitution, can exist. And there are those also who fail to believe that there is any violation of the Constitution in the assumption of a right by the President, to suspend the operation of the writ of *habeas corpus* in the case of all persons, who in any part of the country, may be arrested without warrant, and held without trial, notwithstanding the guarantees of the Constitution, expressly intended to secure the personal liberty of the citizens of the States from violation by the government of the Union. They know that all this is done on the general allegation that the President may do whatever is required by any military necessity, and that he is the sole judge when such necessity arises, and what it demands, — they know that this makes him a military dictator, an absolute despot, holding in time of war the lives, liberty, and property of all persons, at his sovereign will and pleasure, (limited only by the force which he can command to execute that will,) and thus changes the Government, at the pleasure of the President, from a free government under the Constiiution, to a most absolute monarchy. They fail to see that, once possessed and acknowledged to be legitimate, this power may readily be used by the President, if he should be so inclined, or by some future President, to subvert the liberties to secure which our fathers endured a warfare of seven years. If

the President should but apply a modicum of this power, (which so far as they may do, they thus thrust upon him,) in a manner which affected them or theirs, they might begin to perceive, that such a power is subversive of all constitutional liberty; but so long as it is applied only to enemies, and to their political opponents, the danger to liberty does not come within the range of their vision.

Let it not be said that liberty is not as well secured in the Republic of the United States, as it is in the monarchy of Great Britain!

It has been argued that the Executive Department is the safest depositary of the power of suspension, because it is the weakest of the three. But the department which pledges the whole force of the army and navy to execute its decrees is not feeble, and it cannot be but that these things are fraught with great danger to our free republican institutions.

The spirit of liberty is jealous and watchful against encroachment. When that spirit has departed, liberty itself will soon fall a sacrifice. Designing demagogues and fawning sycophants, at the footstool of political preferment, urge the assumption of despotic sway "for the good of the Republic."! Learned and worthy citizens, in their horror of the rebellion, and their earnest desire for its suppression, wish to find in the Constitution, some absolute power in the President to put it down, and they persuade themselves that they have found it. Philanthropists rejoice in the millennium of emancipation, without much regard to the fate of the negro. And timid citizens fearing that they shall be denounced, by the minions of despotism, as traitors, become apathetic.

If these doctrines are sustained, the rebellion is the lesser danger. That may be suppressed, and if the administration shall become wiser, from the errors already committed, and shall address itself to the single purpose of its suppression, it will be suppressed. But the poison of despotic principles, once infused into the system of the Constitution, will paralyze the national life. From that hour, the free Commonwealth is doomed to certain destruction. All history teaches us that such must be the result. But we do not need the lessons of history to assure us of that fact. The question, who is the absolute monarch, who shall exemplify these new

constitutional doctrines, not only by the prison and the court-martial, but by the 'rope's end' and the guillotine, is only a question of time. We may dream of liberty, but the dream will be feverish and short. The handwriting on the wall of our institutions will be to us that which warned the monarch of Babylon, "Thou art weighed in the balances and art found wanting;" and the closing sentence of our history will be, "This was a people whose fathers, with stout hearts, and strong arms, and preëminent wisdom, secured the blessings of liberty to their children, but, in a panic occasioned by a formidable rebellion, they foolishly threw away the priceless inheritance."

But the question is asked will you not endeavor to save the Union? Certainly! — certainly! — most assuredly! — and in the only way in which we can have any assurance that the Union can be saved.

I believe that there is constitutional power enough to accomplish all that can be accomplished. Let that power be brought into exercise, and made effectual. If there are traitors at the North plotting in favor of rebellion, arraign them for their conspiracies. Conspiracy is a recognized crime. If, as is alleged, there are things done and committed here, designed to give aid and comfort to the rebels, and which are not within the scope and condemnation of the criminal law, bring them within it by the enactment of suitable laws for that purpose, which will define the offences and render the offenders amenable to justice. If there are speeches which counsel forcible resistance to constitutional measures for the suppression of the rebellion, and papers which, in their eagerness to be the first to tell the news, in that way put the enemy in possession of the intentions of the Government, long before the measures which they indicate can be carried into execution, — why has not Congress, in the exercise of an undoubted power of legislation, made these things criminal, and subjected the guilty persons to a lawful punishment? Constitutional freedom of speech is not infringed by the punishment of sedition. The acts which constitute sedition may be defined. Giving information to the enemy may be made highly penal; and the difference between the liberty and the licentiousness of the press is well understood.

If there is a political necessity for legislation, there is no wisdom in a craven fear of another clamor about a sedition law, and adopting, as the alternative, an allegation of a *military necessity* which shall overrule all law, — subvert all freedom, — oppress without reason, — imprison without process, — and punish without offences committed.

Nay, farther, — if there may be a sudden exigency, of imminent hazard to our institutions, — of such a character as to require action so prompt that the ordinary forms cannot be complied with, and the ordinary guarantees observed, without great danger of disaster, — let those whose duty it may be to act in some form, if the exigency be such as to require it, exert the necessary power of force, and no more, honestly avowing that the act transcends the constitutional power, and is exercised on the ground of necessity; and appeal to the community for such indemnity and justification as the case admits of.

If there must be acts which transcend constitutional power, it were immeasurably better that they should be placed on this basis, so that those who commit them will stand responsible, (as in the case of the British ministry exercising like power,) to maintain the necessity and the exigency, rather than have them set up as constitutional; and justified as an exercise of a lawful right under a construction of the Constitution which makes that instrument like the apples of Sodom, fair to look upon, but within are dust, and ashes, and bitterness, and disappointment.